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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KIRK RICHARDS,

Plaintiff and Appellant,

v.

LINDY OFFICE PRODUCTS, INC.,
et al.,

Defendants and Respondents.

B280624

(Los Angeles County
Super. Ct. No. BC623264)

APPEAL from an order of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Reversed.

The Kruger Law Firm, Jackie Rose Kruger and Dawei Chi, for Plaintiff and Appellant.

Tressler LLP and Karl P. Schlecht for Defendants and Respondents.

Kirk Richards, an employee of Lindy Office Products, filed a lawsuit alleging that Lindy had terminated him. After Lindy advised him that he had not been terminated, they asked him to dismiss the complaint. When he refused, Lindy filed a demurrer and a motion for sanctions. The trial court granted the motion for sanctions and dismissed the case. Finding that dismissal was unwarranted at this stage of the proceedings, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

According to his complaint filed in this matter,¹ Kirk Richards began his employment with Lindy Office Products in January 2015. In August of that year, he began a medical leave. While he was on leave, he received a letter indicating his 401K plan was being disbursed, and upon inquiry, he was informed that this was due to termination of his employment.

In February 2016, Richards's counsel asked Lindy to advise them of the status of Richards's employment. In response, Lindy's counsel advised that due to the sale of the company, the plan had been terminated. All employees received the letter that Richards received.

On August 8, 2016, counsel for Lindy wrote to Richards's counsel, repeating the explanation for the letter Richards had received, and confirming that Richards's employment had not been terminated. Lindy advised Richards in the letter of its

¹ The complaint, filed in June 2016, alleges wrongful termination in the first and second causes of action, retaliatory termination in the third cause of action, disability discrimination in the fourth and fifth causes of action, and failure to accommodate in the sixth cause of action. Each cause of action alleges termination.

intent to file a demurrer and motion for sanctions should Richards not amend the complaint to delete all allegations concerning termination. Richards did not amend his complaint.

On September 2, Lindy served its motion for sanctions. Consistent with the provisions of Code of Civil Procedure section 128.7,² Lindy did not file its motion until September 27; the hearing was set on October 20. Lindy's motion sought dismissal of the complaint, and attorney's fees and costs.³

Richards filed opposition to the motion for sanctions on October 6. He argued that there had been conversations and emails that supported his allegations that he had been terminated, referencing the charging allegations in his complaint. In support, he filed copies of relevant pleadings, and a copy of the letter sent in response to Lindy's August 8 letter; he did not include a declaration describing conversations or attaching any correspondence either he or his counsel may have had with Lindy.

The trial court heard argument on October 20. Richards's counsel argued that there were facts supporting the claim of termination, but the court noted that he had placed no evidence in the record to support the argument. The court granted the motion for sanctions.

In its ruling, the court reviewed the evidence provided by Lindy in support of its motion, and emphasized the fact that

² All further statutory references are to the Code of Civil Procedure.

³ Lindy also filed a demurrer to the complaint on August 26, but the court did not rule on the demurrer and it is not at issue in this appeal.

Richards had provided no evidence in support of his claim other than his unverified complaint. The court found overwhelming evidence that Richards not only had not been terminated, but also had been told three times that he had not been terminated. In light of the fact that the record contained no evidence to refute this, the court found that Lindy had established that there was no evidentiary support for the claim. The court found monetary sanctions in the amount of \$3000 and dismissal warranted and sufficient to “deter the repetition of the violation of Code Civil Procedure section 128.7 identified herein and comparable conduct by others similarly situated.”

Richards subsequently filed a motion to vacate the court’s dismissal and award of monetary sanctions. The court denied the motion; in this appeal, Richards does not challenge the denial of that motion.⁴

DISCUSSION

On appeal, Richards asserts that the court erred because: it is improper to grant a motion under section 128.7 at the pleading stage; he provided a sufficient showing of factual support for the pleadings; dismissal of the claims other than those for wrongful termination was improper, because those claims included allegations other than termination; the court should not have considered evidence of communications after the filing of the

⁴ Richards ‘s notice of appeal does indicate that he is appealing the order after judgment, but raises no issue concerning that denial in his briefing. Accordingly, he has forfeited any arguments pertaining to the motion. (See, e.g., *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 690, fn. 18 [where party fails to set forth argument or cite authority in support of an issue, the issue is forfeited on appeal].)

complaint between the parties; and dismissal was too severe a penalty on the record before the court.

A. We Review For Abuse of Discretion

Section 128.7 permits a court to sanction parties and their counsel who have presented to the court pleadings that do not satisfy the conditions set forth in the statute. As relevant here, by presenting pleadings to the court, an attorney is certifying that “the allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” (§ 128.7, subd. (b)(3).)

Under the statute, a claim is deemed factually frivolous when “not well grounded in fact.” (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167.) To warrant the imposition of sanctions, the assertion of the claim must be objectively unreasonable (*ibid.*), meaning “any reasonable attorney would agree that [it] is totally and completely without merit.” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

On appeal, “[w]e review a section 128.7 sanctions award under the abuse of discretion standard. (Citation.) We presume the trial court’s order is correct and do not substitute our judgment for that of the trial court. (Citation.) To be entitled to relief on appeal, the court’s action must be sufficiently grave to amount to a manifest miscarriage of justice. (Citation.)” (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 190 (*Bucur*); *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 441 (*Peake*); see also *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235, 242.)

B. The Court Abused Its Discretion By Dismissing the Complaint

This case presents difficult issues. With knowledge that the defendants challenged the factual underpinnings of the case, and intended to demonstrate that position to the court, the appellant nonetheless took no action to demonstrate support for the allegations of his complaint. He neither presented evidence clearly within his own knowledge and control through a personal declaration or the presentation of documents, nor sought discovery from defendants of evidence he believed to exist. When the motion for sanctions was filed, he did not seek, during the safe harbor period, to take discovery or to advise the court that he needed time to do so. Even at the hearing, when the court made clear its concerns about the lack of evidence, he did not seek a continuance to obtain or present evidence, but only offered live testimony inappropriate for that hearing. The court did not abuse its discretion by considering those circumstances.

1. California Law Does Not Preclude A 128.7 Motion at The Pleading Stage

Appellant argues that the use of a section 128.7 motion to challenge the sufficiency of the evidentiary support of a pleading improperly circumvents the summary judgment process, relying on authority from the federal courts. While he is correct that California views federal authority interpreting the analogous Rule 11 of the Federal Rules of Civil Procedure as persuasive, there is ample California law in this area which establishes principles different from the federal authorities Richards cites. This court will follow California law.

In *Peake, supra*, 227 Cal.App.4th at p. 436, defendant filed a sanctions motion under section 128.7 after the complaint was filed without filing a motion for summary judgment. There, as in this case, defendant supported the motion with evidence showing the claims made in the complaint could not be supported. The trial court adjudicated the motion, and imposed sanctions; the reviewing court affirmed.

In *Bucur, supra*, 244 Cal.App.4th at p. 181, the trial court imposed sanctions after granting a motion for judgment on the pleadings. Again, there was no holding, or suggestion, that the statute prohibited a motion for sanctions at that early stage of the proceedings.

The trial court in this case did not abuse its discretion in considering the motion at the pleading stage. Richards had time to gather evidence, once he was put on notice that Lindy intended to establish that he had not been fired; he neither did so, nor requested a stay of consideration of the motion so that he could marshal evidence or conduct discovery to support his allegations.

2. The Record Contains No Evidentiary Support for the Pleadings

Richards argues that the trial court acknowledged the existence of evidence supporting his pleadings in its order. To the contrary, the trial court made clear that Richards had failed to present any evidence.

Richards also comments that “the lower court chose to believe Defendant’s version of the facts, and expected Plaintiff to contradict such interpretation with evidence.” He asserts that he was not required to provide evidence in opposition, but his argument is unsupported by legal authority, and thus is not

properly before us. (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599-600 [appellant has burden to present legal authority for all arguments made]; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) Moreover, that assertion is inconsistent with the cases discussed above on which the trial court relied.

While Richards discusses *Peake* and *Bucur*, his argument relies on a federal case that he interprets to hold that, if any inference that may be drawn from the evidence presented supports the pleadings, sanctions are improper. That case, *Kiobel v. Millson* (Second Cir. 2010) 592 F.3d 78, does not stand for that proposition. Instead, the *Kiobel* court discussed the many strands of evidentiary support presented by the plaintiff in finding sufficient grounds to deny the Rule 11 motion. Here, Richards presented no evidence supporting the central fact of termination to the trial court on which it could rely.

3. The Trial Court Properly Considered Evidence of Communications After the Filing of the Complaint

Richards asserts that the trial court should not have considered post-filing communications from defense counsel informing him that he had not been terminated. He argues that, because there was an objective reasonable evidentiary basis for the claims at the time of filing, there is no necessity to look further.

His approach fails for two reasons. Primarily, the court found no evidentiary support for the claim of termination at the time of filing. In any event, the law does not permit a party to ignore information that he or she becomes aware of after the

filing of the complaint that demonstrates the pleadings are inaccurate.

Even an action that is not frivolous at the time of filing may become so. Accordingly, “a plaintiff’s attorney cannot ‘just cling tenaciously to the investigation he had done at the outset of the litigation and bury his head in the sand.’” (*Peake, supra*, 227 Cal.App.4th at p. 441, citing *Childs v. State Farm Mut. Auto. Ins. Co.* (Fifth Cir. 1994) 29 F.3d 1018.1025.) Rather, counsel, and the court, must consider the opposing party’s evidence.

Richards’s objection to the court considering all of the evidence ignores this requirement, and does not demonstrate an abuse of discretion.

4. The Court Abused Its Discretion in Imposing Dismissal As A Sanction

Again, relying on non-binding federal authority and a non-citable unpublished case in California⁵, Richards argues that the sanction of dismissal was too harsh, and should be reversed on that ground. Richards argues that the court could have ordered the production of additional evidence, or granted an opportunity to amend the pleadings. However, the fact remains that his opposition to the motion for sanctions contained no evidence to support his position, and he offered no facts at the hearing that would support a cause of action that did not turn on termination.

⁵ Richards attempted to avoid the prohibition on citing unpublished cases (Cal. Rules of Court, rule 8.1115(a)) by requesting that this court take judicial notice of the opinion; by separate order we denied that request.

On this record, Richards has not established any basis in fact or law to demonstrate that sanctions were not appropriate.

Dismissal, however, was too harsh a sanction under the circumstances of this case. “Code of Civil Procedure section 128.7 sanctions should be ‘made with restraint’ [citation] and are not mandatory even if a claim is frivolous.” (*Peake, supra*, 227 Cal.App.4th at p. 448.) Even if a plaintiff cannot successfully defend against either demurrer or summary judgment, that alone is insufficient to support the sanction of dismissal. (*Ibid.*)

The statute expressly provides that: “A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the violation.” (§ 128.7, subd. (d).) Thus, a trial court has a number of alternatives it may consider in determining what sanction is appropriate in a given case, and must explain the basis for the sanction it chooses. (§128.7, subd. (e).)

In this case, the trial court did not state a reason for choosing dismissal over other alternatives. At this early stage of the proceedings, without such an explanation, and in the absence of any basis in the record to establish that a lesser sanction would be an insufficient deterrent, we find dismissal to be too harsh a sanction.

DISPOSITION

The judgment is reversed, and the case remanded to the trial court to consider alternative sanctions, and to conduct further proceedings in the matter, including, but not limited to, consideration of the demurrer taken off calendar. Appellant is to recover his costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.